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## STANDING IN THE WAY OF PARENTAL RIGHTS—THE TEXAS SUPREME COURT RESOLVES COURTS OF APPEALS SPLIT IN FAVOR OF NONPARENTS

Madison Bertrand\*

In *In re H.S.*, the Supreme Court of Texas held that a nonparent has standing to pursue a suit affecting the parent-child relationship (SAPCR) even when the child's parents have not wholly relinquished their parental rights and responsibilities.<sup>1</sup> In its holding, the court declared that granting nonparent standing under Texas Family Code § 102.003(a)(9) “to persons ‘who have played an unusual and significant parent-like role in a child’s life’ . . . does not unconstitutionally interfere with parents’ fundamental liberty interest in raising their children.”<sup>2</sup> The court decided to use the statutory interpretation of § 102.003(a)(9) outlined in *Jasek v. Texas Department of Family & Protective Services*<sup>3</sup> to reach its holding in *In re H.S.*<sup>4</sup> In favor of the *Jasek* interpretation, the court used its authority to resolve the split among the Texas courts of appeals by discounting the valid arguments of particular courts of appeals, as well as by emphasizing the United States Supreme Court’s recognition of the “fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>5</sup> The court erred in its holding because the fundamental right of parents requires a parent to relinquish their parental rights under § 102.003(a)(9) before a nonparent may assert standing.

Section 102.003(a)(9), entitled “General Standing to File Suit,” confers standing to file a SAPCR on a “person, other than a foster parent, who had actual care, control, and possession of the child for at least six months.”<sup>6</sup> Disputes surrounding the interpretation of this statute generally hinge on what is required

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1. *In re H.S.*, 550 S.W.3d 151, 163 (Tex. 2018).

2. *Id.* (citation omitted).

3. See 348 S.W.3d 523, 535 (Tex. App.—Austin 2011, no pet.).

4. 550 S.W.3d at 157.

5. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion).

6. TEX. FAM. CODE ANN. § 102.003(a)(9).

to have “actual control.” This was the central issue in *In re H.S.*<sup>7</sup>

## I. BACKGROUND

For the first twenty-three months of her life, Heather<sup>8</sup> lived in the home of her maternal grandmother and step-grandfather (Grandparents).<sup>9</sup> Heather’s mother (Mother) and father (Father) were Heather’s “joint managing conservators,”<sup>10</sup> meaning both Mother and Father shared joint custody<sup>11</sup>—specifically, responsibility and authority—of Heather. Mother, who was not married to Father, periodically resided with Heather at Grandparents’ home until she moved into a sober-living facility to treat her alcohol addiction.<sup>12</sup> At that time, the parties unanimously agreed that Heather would continue to live with Grandparents while Mother remained in the facility.<sup>13</sup> Mother was in the facility for six months, during which Grandparents served as Heather’s “primary caregivers” and thus “directed [her] day-to-day activities and took care of her daily needs; provided her with a home, food, clothing, and shelter; . . . paid for her daycare,” and addressed her medical needs.<sup>14</sup> During this time, Mother and Father remained involved in Heather’s life: Mother saw Heather regularly, often assisting with Heather’s nightly routine, and Heather stayed with Father about every other weekend.<sup>15</sup> Mother and Father also made medical decisions for Heather, authorizing doctors’ visits and medical treatments.<sup>16</sup> Ultimately, “Grandparents kept Mother and Father informed about Heather’s daily activities and medical needs and ‘sought input’ from them on decisions that needed to be made about her.”<sup>17</sup>

Eventually, Grandparents filed a SAPCR, requesting appointment as Heather’s managing conservators and alleging they had standing to sue as nonparents under § 102.003(a)(9).<sup>18</sup> In response, Father filed a plea seeking to dismiss Grandparents’ petition for lack of standing, arguing that Grandparents did not have the statutorily required “actual control” of Heather because Mother and Father “intended the arrangement with Grandparents to be temporary . . . [and] did not intend to relinquish . . . control of Heather to Grandparents.”<sup>19</sup> The trial court granted Father’s plea and dismissed Grandparents’ petition, finding that Grandparents did not establish the statutorily required actual control over Heather.<sup>20</sup> The court of appeals affirmed, holding

7. 550 S.W.3d at 156.

8. “Heather” is the pseudonym the courts used to refer to the child at issue. *Id.* at 152 n.1.

9. *Id.* at 152–53.

10. *Id.* at 153.

11. *See id.*; *see also* TEX. FAM. CODE § 101.016 (defining “joint managing conservatorship”).

12. *In re H.S.*, 550 S.W.3d at 153.

13. *Id.*

14. *Id.* (internal quotation marks omitted in first quotation).

15. *Id.*

16. *Id.* at 153–54.

17. *Id.* at 154.

18. *Id.*

19. *Id.*

20. *Id.*

[S]tanding under section 102.003(a)(9) cannot be gained by a nonparent exercising care, control, and possession over a child in the absence of evidence that the child's parent is unfit or has abdicated his or her own care, control, and possession over the child to the nonparent for the statutory period.<sup>21</sup>

The Texas Supreme Court granted the petition for review.<sup>22</sup>

## II. THE TEXAS SUPREME COURT'S ANALYSIS

Upon review, the Texas Supreme Court applied the statutory interpretation used in *Jasek* to declare that Grandparents had standing and remanded the case to the trial court on the merits.<sup>23</sup> The *Jasek* Court concluded that a nonparent has actual control under § 102.003(a)(9) when they “exercise . . . guidance, governance and direction similar to that typically exercised on by parents with their children,”<sup>24</sup> regardless of the status of the parents' rights.<sup>25</sup> In adopting this interpretation, the Texas Supreme Court stated that such a holding establishes a “high” and “narrow” threshold for nonparent standing in Texas<sup>26</sup> that recognizes the fundamental but conditional rights of parents.<sup>27</sup> In finding actual control in nonparents who “play[] an unusual and significant parent-like role in a child's life,” the court dismissed any requirement that parents relinquish their own parental rights, including legal authority, before nonparent standing may be established.<sup>28</sup>

To reach its holding, the court first had to determine the plain meaning of actual control. In doing so, the court applied statutory interpretation principles, presuming the legislature meant for each word of the statute to have an individual and purposeful meaning.<sup>29</sup> In deciding the plain meaning of actual control,<sup>30</sup> the court first addressed the issue of whether the statute required nonparents to have legal authority over the child. In an attempt to avoid too narrow of an interpretation, the court determined that the ordinary meaning of actual control was explicitly separate from “legal control” or “any other language indicating that

21. *In re H.S.*, 552 S.W.3d 282, 289 (Tex. App.—Fort Worth 2016) (mem. op.), *rev'd*, 550 S.W.3d 151 (Tex. 2018).

22. *In re H.S.*, 550 S.W.3d at 154.

23. *Id.* at 163.

24. *Jasek v. Tex. Dep't of Family & Protective Servs.*, 348 S.W.3d 523, 533 (Tex. App.—Austin 2011, no pet.) (citing *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 636 (Tex. App.—Dallas 2003, no pet.)).

25. *In re H.S.*, 550 S.W.3d at 160.

26. Compare *id.* at 163, with *Troxel v. Granville*, 530 U.S. 57, 61 (2000) (plurality opinion) (holding a visitation statute permitting “[a]ny person” to petition for visitation rights “at any time” unconstitutional).

27. *In re H.S.*, 550 S.W.3d at 163.

28. *Id.* (internal quotation marks omitted) (quoting *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1149 (Me. 2004)).

29. *Id.* at 155.

30. “‘Actual’ means ‘[e]xisting in fact; real[,]’ . . . [a]nd ‘control’ is commonly defined as ‘the power or authority to manage, direct, or oversee.’” *Id.* at 157 (first alteration in original) (citations omitted) (first quoting *Actual*, BLACK'S LAW DICTIONARY (10th ed. 2014); and then quoting *Control*, BLACK'S LAW DICTIONARY).

[the legislature] intended formal legal authority over the child to be a condition for standing under subsection (a)(9).”<sup>31</sup> To support this determination, the court cited *Jasek*’s holding that actual control is separate and distinguishable from a “bare legal right of control.”<sup>32</sup> It reasoned that actual control is consistent with making the “day-to-day decisions” associated with raising a child, such as “when she gets up and goes to bed, how much television she watches, whether she gets dessert, [and] when she needs to go to the doctor.”<sup>33</sup> Thus, actual control is inconsistent with making only the “important” or legal decisions.<sup>34</sup> This interpretation preserved separate meaning for the term “actual care”—and avoided rendering it superfluous—because actual *control* requires a nonparent to make the day-to-day decisions associated with raising a child while actual *care* requires the literal accomplishment of those decisions.<sup>35</sup> Although the court acknowledged that parents who maintain their parental rights have the legal authority to supersede nonparent decisions and permission, it held this merely highlighted the difference between actual control and legal control.<sup>36</sup> The court ultimately determined that “had the Legislature intended to require [legal] authority, it would have said so.”<sup>37</sup> Therefore, the court held Grandparents had standing although Mother and Father remained Heather’s managing conservators.<sup>38</sup>

The second issue the court determined was whether the plain meaning of actual control required nonparents to have exclusive control of the child. In *Smith v. Hawkins*, a Houston court of appeals found no exclusivity requirement in § 102.003(a)(9).<sup>39</sup> In this case, the Texas Supreme Court cited *Smith* and similarly argued that such a condition on standing “would effectively add an exclusivity requirement that is not reflected in the statute’s plain language.”<sup>40</sup> It stated that focusing the analysis of nonparent standing on the parents’ conduct ignored the plain terms of the statute, which do not mention parental conduct.<sup>41</sup> The court again determined that the legislature would have included a requirement of “total ‘abdication’ by the parent” had that been the legislature’s intent.<sup>42</sup> Accordingly, the court held Grandparents had standing even though Mother and Father had not relinquished their parental rights and responsibilities and, to the contrary, remained actively involved in making decisions about Heather.<sup>43</sup>

31. *Id.* (internal quotation marks omitted in first quotation).

32. *See id.* at 156 (quoting *Jasek v. Tex. Dep’t of Family & Protective Servs.*, 348 S.W.3d 523, 535 (Tex. App.—Austin 2011, no pet.)).

33. *Id.* at 158.

34. *Id.*

35. *Id.*

36. *Id.* at 158–59.

37. *Id.* at 157.

38. *Id.* at 161.

39. *Smith v. Hawkins*, No. 01-09-00060-CV, 2010 WL 3718546, at \*3 (Tex. App.—Houston [1st Dist.] Sept. 23, 2010, pet. denied) (mem. op.).

40. *In re H.S.*, 550 S.W.3d at 158 (citing *Iliff v. Iliff*, 339 S.W.3d 74, 80–81 (Tex. 2011)).

41. *Id.* at 159.

42. *Id.* at 158.

43. *Id.* at 160.

### III. WHY THE TEXAS SUPREME COURT GOT IT WRONG

The Texas Supreme Court incorrectly concluded that Grandparents had actual control—and, therefore, standing to sue.<sup>44</sup> By contrast, multiple Texas courts of appeals, including the Fort Worth and Beaumont courts of appeals, have held that for a nonparent to achieve actual control, the child's parents must first give up actual care, control, and possession.<sup>45</sup> These courts reasoned that this interpretation of § 102.003(a)(9) comports with the text of the statute and avoids potential encroachment on the fundamental rights of parents.<sup>46</sup> They rely on the notion that,

so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.<sup>47</sup>

Therefore, a nonparent cannot have standing unless the parent is unfit or has relinquished his or her parental rights.<sup>48</sup> In *In re M.J.G.*, the Fort Worth court of appeals rejected the grandparents' claim of standing in a SAPCR because there was no evidence that the children's parents had abdicated their parental rights to the grandparents since the parents lived with the children in the grandparents' home.<sup>49</sup> The court found that although the children lived with their grandparents and the grandparents performed "day-to-day" duties on behalf of the children, this was insufficient to establish that the grandparents had "actual care, custody, and control" of the children.<sup>50</sup> Similarly, in *In re K.K.C.*, the Beaumont court of appeals held that a nonparent did not have standing because the parent "lived with the child, adequately cared for the child, and did not relinquish to [the nonparent] or abdicate her parental rights, duties, and responsibilities."<sup>51</sup> In that case, it did not matter that the nonparent spent holidays with the child, disciplined the child, attended the child's school functions, or provided financial support for the child.<sup>52</sup> These holdings properly reflect the United States Supreme Court's recognition of the fundamental nature of parental rights.

Furthermore, in the case at issue, Justice Blacklock argued in dissent that the court should "adopt the reading [of § 102.003(a)(9)] that avoids burdening parents' unalienable right to raise their children as they see fit."<sup>53</sup> This reading mandates that a nonparent cannot have the "actual care, control, and possession"

44. *Id.* at 158.

45. *Id.* at 171 n.2 (Blacklock, J., dissenting).

46. *Id.* at 171, 174.

47. *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (plurality opinion) (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

48. *In re H.S.*, 552 S.W.3d 282, 289 (Tex. App.—Fort Worth 2016) (mem. op.), *rev'd*, 550 S.W.3d 151 (Tex. 2018).

49. *In re M.J.G.*, 248 S.W.3d 753, 758–59 (Tex. App.—Fort Worth 2008, no pet.).

50. *Id.*

51. *In re K.K.C.*, 292 S.W.3d 788, 793 (Tex. App.—Beaumont 2009), *abrogated by In re H.S.*, 550 S.W.3d 151 (Tex. 2018).

52. *Id.* at 791.

53. *In re H.S.*, 550 S.W.3d at 166 (Blacklock, J., dissenting).

required for standing under § 102.003(a)(9) unless the child's parent has relinquished their parental rights.<sup>54</sup> Justice Blacklock noted that actual control must mean something more than making the day-to-day decisions: "If all . . . 'control' means is deciding 'when [a child] gets up and goes to bed, how much television she watches, whether she gets dessert, [and] when she needs to go the doctor,' then [there is no discernable] distinction between 'care' and 'control,'" and the term "control" is thereby superfluous.<sup>55</sup> Moreover, Justice Blacklock suggested the court erroneously treated actual control and legal control as opposites.<sup>56</sup> He argued that actual control is fused with the parents' legal control until relinquished.<sup>57</sup> Thus, in this case, Justice Blacklock reasoned that Grandparents seeking the approval of Mother and Father for Heather's medical care and regularly reporting to them about Heather's activities "[were] not signs of parent-like control. They [were] signs of its absence. They [were] signs that control actually lies within the one receiving the reports about the child, not the one making them."<sup>58</sup>

The court should have found—for the same reasons Justice Blacklock's dissent and some Texas courts of appeals did—that "[t]he best reading of the text of section 102.003(a)(9) requires a child's parents to relinquish or shirk their 'actual control' of the child before a non-parent may assert the 'actual control' required for standing."<sup>59</sup> Moreover, the American family is changing: from 1970 through 2012, the percentage of children living in a grandparent-maintained household doubled from 3% to 6%.<sup>60</sup> This increase in grandparent coresidence was primarily attributed to increasing rates of divorce and teenage pregnancy.<sup>61</sup> These realities demand an interpretation of § 102.003(a)(9) that requires parents to relinquish actual control. Parents should be encouraged to seek out individuals who can help provide quality care for their children without fear of compromising their parental rights. Such a holding does not diminish the special role nonparents play in the lives of children but instead magnifies the critical right parents have to control their children's upbringing, which is one of the oldest "fundamental liberty interests recognized by [the United States Supreme Court]."<sup>62</sup> Therefore, delegating day-to-day care of a child "[should] not reduce the parents' control over the child or [equate to] shar[ing] 'parent-like' control with others."<sup>63</sup>

Furthermore, the court's holding has severe constitutional ramifications. Even though the majority argued the constitutionality of its interpretation, when there is standing, a judge having "the power to review a parent's decisions about the extent to which non-parents should be involved in a child's life undermines the

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54. *Id.*

55. *Id.* at 172 (first two alterations in original) (quoting *id.* at 158 (majority opinion)).

56. *Id.* at 170 (Blacklock, J., dissenting).

57. *Id.* at 171.

58. *Id.* at 173.

59. *Id.* at 177.

60. RENEE R. ELLIS & TAVIA SIMMONS, U.S. CENSUS BUREAU, CORESIDENT GRANDPARENTS AND THEIR GRANDCHILDREN: 2012, at 3 (2014).

61. *Id.* at 3–4.

62. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

63. *In re H.S.*, 550 S.W.3d at 170.

parents' role as the ultimate decision-makers for their child."<sup>64</sup> It is clear the United States Supreme Court intended to avoid just this: "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."<sup>65</sup> The risk of exposing parents to litigation over the parent-child relationship is incredibly detrimental. Such litigation not only disempowers parents but also devastates important, often familial relationships.<sup>66</sup> Also, the legal system generally lacks the specialized training to deal with such complex and challenging issues, instead relying largely on the vague "best interests standard" to determine intimate familial matters.<sup>67</sup> For "fit parents, true control of their children is an illusion if the courts really get to make the final call."<sup>68</sup>

#### IV. CONCLUSION

The Texas Supreme Court erred in its holding by broadly interpreting the term "actual control," thereby burdening parents who have not relinquished their fundamental parental rights and responsibilities. In a country that has recognized the fundamental right of parents to "bring up [their] children" since 1923,<sup>69</sup> the court should have erred on the side of caution to recognize that it is "cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."<sup>70</sup> There still exists a fundamental right of parents: because they did not relinquish their rights—and, to the contrary, remained devoted to Heather—Mother and Father alone deserve the right to ultimately make decisions about Heather's future.

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64. *Id.* at 177.

65. *Troxel*, 530 U.S. at 72–73.

66. Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 204 (2004).

67. *Id.* at 206.

68. *In re H.S.*, 550 S.W.3d at 177.

69. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

70. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).